MOTION FILED
APR 18 2005

No. 04-971

In The
Supreme Court of the United States

SERRA CANYON COMPANY, LTD.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Second Appellate District

MOTION OF THE *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND LEAVE TO EXTEND THE FILING DATE FOR *AMICUS CURIAE*

JUNE BABIRACKI BARLOW, General Counsel
Counsel of Record
NEIL KALIN, Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Avenue
Los Angeles, California 90020
(213) 739-8277

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF THE CALIFORNIA ASSOCIATION OF REALTORS® FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND LEAVE TO EXTEND THE FILING DATE FOR *AMICUS CURIAE*

Amicus curiae the California Association of REALTORS® ("C.A.R.") respectfully requests leave of this Court to file the following brief in the above captioned matter. In support of its motion, C.A.R. states as follows:

1. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondent Attorney General for California has indicated its consent is unnecessary since a motion is already required for this court to consider this brief past the April 8, 2005 time for filing as set forth in the Respondent's letter also filed simultaneously with this Brief and Motion.

2. The California Association of REALTORS® received information about this case in March and had to go through its extensive approval processes by the Legal Action Fund Trustees which C.A.R. uses to vet the many requests for its participation. C.A.R. was also was under the misunderstanding that the time for filing was April 18th instead of the April 8th date set forth in the rules. No party will be prejudiced by the filing on April 18th, the same day the Reply is due. C.A.R. believes its views will be of assistance to the Court in this case.

The California Association of REALTORS® ("C.A.R.") is a non-profit, voluntary real estate trade association whose members consist of local Boards and Associations of REALTORS® and approximately 160,000 persons licensed

as real estate brokers and salesperson by the State of California as well as affiliate members such as real estate appraisers, title insurers, mortgage lenders, and real estate attorneys. C.A.R. has been representing the real estate industry for one hundred years since its establishment in 1905.

C.A.R. is actively engaged in promoting and establishing reasonable standards to govern the transfer of real estate and licensed real estate activity and the protection of private property rights. Members of C.A.R. assist the public in buying, selling, leasing, developing and managing residential and investment real estate. C.A.R. advocates the preservation of real property rights and the adherence to the constitutional protections against unconstitutional taking of property.

At issue here is the issue of whether an arm of the government of California can continue to perfect its prior activities, and long time goal, of taking properties along the coast of California without paying the owners in blatant disregard of this Court's ruling in *Nollan v. California Coastal Commission*, 483 U.S 825 (1987). This case is about more than an isolated individual not complaining in time. Hundreds of properties will be exposed to the same fate as that facing Petitioner (See, Improving Coastal Access and Development Mitigation, January 2005, http://www.lao.ca.gov/). This was in fact part of a strategy to actively confiscate property, without regard to harm done by development, in order to acquire publicly owned coastline. Whether the constitutional protections afforded property owners can be swept away by Catch-22 time bars and the passage of time would truly put an expiration, if not a road map for evasion, on the takings clause of the Constitution. For this reason we respectfully

request that this Court grant this motion and permit C.A.R. to present its views and allow C.A.R. to participate as *amicus curiae*.

Respectfully submitted,

JUNE BABIRACKI BARLOW, General Counsel
NEIL D. KALIN, Assistant General Counsel
CALIFORNIA ASSOCIATION OF REALTORS®
525 South Virgil Ave.
Los Angeles, CA 90020
(213) 739-8277

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Coastal Commission and courts of California, and elsewhere, can evade rulings made by this Supreme Court and deny just compensation for a taking of private real estate for public purposes because a property owner challenges an unlawful taking at the time the physical taking occurs rather than when a potential to lose the property is only theoretically possible.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
BRIEF OF *AMICUS CURIAE*, CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITONERS	1
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION	1
CONSTITUTIONAL PROTECTIONS SHOULD OVERRIDE STATE-IMPOSED TIME BARS TO CLEARLY UNCONSTITUTIONAL TAKINGS WHEN THE TAKING HAS NOT BEEN COMPLETED	4
A. Traditional real estate laws related to whether there was a right to accept an offer is not determinative of the timing of a taking due to the possibility it may not occur	4
B. Allowing a challenge to a taking of property at the time an offer to dedicate is accepted by the applicable governmental body is consistent with both Public Resources Code section 30801 and the Fifth Amendment to the U.S. Constitution as interpreted by this court.	5
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES:

Nollan v. California Coastal Commission, 483 U.S 825 (1987) ..... *passim*

Serra Canyon v. California Coastal Commission, 120 Cal.App.4th 663 (2004) 3, 5, 6

Travis v. County of Santa Cruz, 33 Cal.4th 757 (2004) 6

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V 1, 5, 7

STATUTE:

Public Resources Code section 30801 ..... 1, 5, 6

OTHER AUTHORITIES:

Improving Coastal Access and Development Mitigation, January 2005, http://www.lao.ca.gov/2005/coastal_comm/coastal_comm_011905.pdf .....2, of Motion

BRIEF OF *AMICUS CURIAE* CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The California Association of REALTORS® ("C.A.R.") incorporates by reference the statement of interest in its foregoing motion for leave to file a brief as *amicus curiae*.

INTRODUCTION

This case stems from the relationship and tension between two sources of legal authority: The Fifth Amendment to the United States Constitution, which provides, in pertinent part, "[N]or shall private property be taken for public use, without just compensation" and Section 30801 of the California Public Resources Code, which provides, "An aggrieved person shall have a right to judicial review of any decision or action of the commission . . . within 60 days after the decision or action has become final." The core issue is whether the structure of the mechanism the Coastal Commission used to extract coastal property without payment is now working to deprive hundreds of property owners of sixty-day time filing requirement, because the possibility that the State may exercise their

[1] Petitioner consented in writing to the filing of this brief, and its letter of consent has been filed with the Court. Respondent responded that its consent to the filing of this brief was unnecessary as set forth in its letter filed with the Court. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

recorded "right" began twenty years earlier than the actual taking by transfer of title and physical occupation.

In 1981, the California Coastal Commission required an offer to dedicate from the then-property owner as part of the process by which the owner was given a permit to develop unrelated property located elsewhere. Unlike a traditional option or right of first refusal, no independent payment was made or agreed upon for the offers to dedicate when (and if) the offers were ever accepted. The Commission asserts that the mere giving of a permit, conditioned on giving a full parcel of land and unrelated to the burden of the proposed affordable mobile homes added, is consideration. The Coastal Commission's undisguised purpose was to obtain coastal land, without compensating the owners of the property, at no cost to the state, for public use. These very same strategies were found unconstitutional under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987):

> That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (*and other coastal residents*) alone can be compelled to contribute to its realization. Rather California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U.S. Const. Amdt. V; but if it wants an easement across the Nollans' property, it must pay for it." *Id.* at 15-16. (*emphasis added.*)

But the Commission never stopped implementing its plan to complete the extraction of properties unrelated to any burden the property owners may have caused. Instead

it patiently continued the original plan and at the end of the 21-year period strategically began sweeping up its ill-gotten gains. Like unenforceable covenants in deeds that still exist today, these unconstitutionally extracted offers to dedicate lay dormant in recorded documents and should be void; no physical occupation of the property had yet occurred, they were just "offers" which still would have to be accepted. Surely the *Nollan* protections that held this very Commission's similar acts unconstitutional would make the offers impotent.

Undettered by this Court's declaration, the California Coastal Commission awakened when the unconstitutionally exacted "offers" were about to expire by their own terms after 21 years of gathering dust in the recorder's office. As part of the original plan, the Commission created a Coastal Conservancy so it could "accept" these offers. When the current property owner challenged the taking, the Coastal Commission asserted a sixty-day time bar to bring such a challenge, asserting it ran nearly twenty years earlier when the offer was obtained. The California Courts upheld this ruling on June 14, 2005, *Serra Canyon v. California Coastal Commission*, 120 Cal.App.4th 663 (2004). Property rights should not be so easily spliced by bisecting the offer from the acceptance and thereby forcing property owners to litigate an offer that may never be accepted – in fact given *Nollan* could reasonably be expected *not* to be accepted – to chase the ephemeral possibility that the State may eventually take their property. If this is the case, it will be easy for States to outmaneuver homeowners along California's Coast, or elsewhere, to obtain land for the benefit of the public without payment. Just require a recorded offer for any unrelated event like a permit with a long time frame – and don't exercise it. The

cost of litigating will deter most homeowners from ever challenging a phantom future event, then when the time is right the Commission or its designee "accepts" the offer and the time to challenge will have expired. No compensation, no possibility of challenge, transfer of cost-free prime coastal land to the State complete.

CONSTITUTIONAL PROTECTIONS SHOULD OVERRIDE STATE-IMPOSED TIME BARS TO CLEARLY UNCONSTITUTIONAL TAKINGS WHEN THE TAKING HAS NOT BEEN COMPLETED

A. Traditional real estate laws related to whether there was a right to accept an offer is not determinative of the timing of a taking due to the possibility it may not occur.

Rights to acquire a dedication to sort out *private* party rights in real estate, are different and therefore not dispositive of whether the *government* completed a taking. Under this rationale, is there still a compensable taking if the offers to dedicate lapse due to the time expiring? In real estate law, options and rights of refusal are generally supported by separate consideration. In fact a promise to hold open an offer (also known as an option) must be supported by separate consideration in order to make the offer irrevocable. But there is usually a separate negotiated price for the exercising of the right itself. One is the opportunity cost, the other is the value of the actual real estate, or use thereof. So if one challenged the unconstitutional taking at the time the offer to dedicate was recorded on the property, would the measurable cost be the speculative diminution in value due to the uncertain possibility the government may exercise a future right?

But anything less than full value for the actual land would not give just compensation – and full physical taking may never occur if the government never accepts the offer.

In a private party transaction, these speculative rights and values could be freely negotiated: one price for the offer and one for the exercise of the right. But since the whole purpose of this strategy is to take at no cost to the government, the separation is hard to measure precisely because the State is trying to confiscate and avoid payment for the second event. They contort not to separate the two events ("dual taking") – yet they must be as they are two truly separate events with radically potentially different outcomes and values. The square peg just will not fit in this round hole.

B. Allowing a challenge to a taking of property at the time an offer to dedicate is accepted by the applicable governmental body is consistent with both Public Resources Code section 30801 and the Fifth Amendment to the U.S. Constitution as interpreted by this Court.

The Public Resources Code (PRC) section at issue in this case gives an aggrieved person the right to judicial review of *any* decision or action of the Commission. Acceptance of an OTD is certainly a decision by the Commission (or in this case its duly appointed transferee). The *Serra* court tries to portray this acceptance as a mere "formality" (*Serra*, *supra*, page 669) but nothing could be further from the truth. If that were really the case, there would be no reason for an OTD, a government body would be immediately available to accept the benefits and burdens of the designated property. Instead, before an OTD will be accepted multiple discretionary acts must occur. An

appropriate governmental or non-profit body must be found that will take responsibility for improving the property, maintaining it, sustaining it, financing it, obtaining approvals from appropriate state agencies and assuring that its use and the facilities are necessary and will be consistent with environmental laws. More than a mere formality, acceptance of an OTD is an independent, separate act for purposes of PRC 30801. As such, an acceptance of an OTD may be challenged within 60 days of the time the decision is made to accept the OTD. And certainly, the scope of the value of the taking changes dramatically if the OTD lapses without ever being accepted.

Holding that an acceptance of an OTD is an independent act is consistent with current California Supreme Court ideology and prevents this Court's holding in *Nollan* from being so easily circumvented. After the *Serra* case was decided, the California Supreme Court decided the case of *Travis v. County of Santa Cruz*, 33 Cal.4th 757 (2004). *Travis* held that an ordinance may be challenged not only at the time of its enactment but also at the time of its *enforcement* against a particular property. The *Travis* court, at page 770, recognized the unfairness in requiring a property owner to have the foresight to challenge a government action years or even decades before such action is applied to the owner's property. *Travis* is analogous here where the OTD was granted but not acted upon for over two decades. At the time the OTD was issued there was a very real possibility that it would never be accepted. To require the owner to challenge at that time would require the owner to commence litigation at the outset of a recording of an offer to dedicate prior to the taking and chase a theoretical eventual taking that might occur within two decades (or might not) or lose her rights to

compensation entirely. Surely the Constitutional rights protecting real property cannot so easily be sidestepped. By accepting hearing to determine whether the acceptance of an OTD is a separate act subject to challenge under the applicable state statute of limitation, this Court can assure that its ruling in *Nollan* is acknowledged in words and in practice – it can allow hundreds of property owners to vet their rights through a hearing now that they know the property actually has been taken.

CONCLUSION

Nollan is the preeminent authority of this Supreme Court holding that government exactions for permit approvals unrelated to the item in question is a taking of private property for public use in violation of the Fifth Amendment to the U.S. Constitution. The California Coastal Commission was the offending party in the *Nollan* case, yet it seems to be unfazed by the ruling. By insisting that unconstitutional exactions can be enforced because challenges were not brought decades before the unlawful exaction is ever completed against the property makes a mockery of this Court's ruling and the U.S. Constitution.

For these reasons, we respectfully urge this Court to accept Serra Canyon Company's Petition for Writ of Certiorari.

Respectfully submitted,

CALIFORNIA ASSOCIATION OF REALTORS®

By
JUNE BABIRACKI BARLOW
NEIL D. KALIN